Supreme Court, U. S.
FILED
NOV 6 1978
MICHAEL RODAK, JR., CLERK

78-755

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

CORNELIUS HOGAN, In his official capacity as Commissioner of Corrections for the State of Vermont, and

RICHARD BASHAW, In his official capacity as Superintendent of the St. Albans Correctional Center,
Petitioners

v.

SCOTT DAVID DUNKERLEY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

		Page
Opinions below		1
Jurisdiction		2
Question presented		2
Constitutional provision and rule involved		2
Statement		3
Reasons for granting the petition		5
Conclusion		11
Appendix A.	Second Circuit Court of Appeals' Opinion, Docket No. 77-2138, filed June 5, 1978	1A
Appendix B.	Modification of Second Circuit Court of Appeals' Opinion, Docket No. 77-2138, filed June 22, 1978	23A
Appendix C.	District Court for the District of Vermont, Docket No. 77-140, filed on October 13, '77	24A
Appendix D.	Vermont Supreme Court Opinion, Docket No. 162-76, filed on June 7, 1977	33A
Appendix E.	Order by Second Circuit Court of Appeals denying Petition for Rehearing, filed on August 7, 1978	41A
Appendix F.	Vermont Rule of Criminal Procedure 43	43A

CITATIONS

Cases: Pages

Arizona v. Washington, 434 U.S. , 98 S.Ct. 824 (1978) 5, 6, 7, 8

Featherton v. Mitchell, 418 F2d 582 (5th Cir. 1970) 9

Gori v. U. S., 367 U.S. 364, 81 S.Ct. 1523 (1961) 6

Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066 (1973) 6

Loux v. U. S., 389 F2d 911 (9th Cir. 1968) 9

Oelke v. U. S., 389 F2d 668 (9th Cir. 1967) 9

State v. Emery, 59 Vt. 84, 7 A.129 (1887) 10, 11

U. S. v. Gentile, 525 F2d 252 (2nd Cir. 1975) 8

U. S. ex rel. Gibson v. Ziegele, 479 F2d 773 (3rd cir. 1973) 10

U. S. v. Grasso, No. 76-1543, certiorari granted, June 26, 1978 8

U. S. v. Jorn, 400 U. S. 479, 91 S.Ct. 547 (1971) 9

U. S. v. Perez, 9 Wheaton (22 U.S.) 579 (1824) 4, 5, 9

U. S. v. Potash, 118 F2d 54 (2nd cir. 1941) 10

U. S. v. Scott, 437 U. S. (1978) 8

U. S. v. Wayman, 510 F2d 1020 (5th Cir. 1975) 10

Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834 (1949) 6, 10

Whitfield v. Warden of Maryland House of Correction, 486 F2d 1118 (4th Cir. 1973) 10

Constitution and rules:

Constitution of the United States, Fifth Amendment 2

Vermont Rule of Criminal Procedure 25 11

Vermont Rule of Criminal Procedure 43 ..... 2, 3

Miscellaneous

159 ALR 750 9

IN THE SUPREME COURT OF THE UNITED STATES

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v.

SCOTT DAVID DUNKERLEY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The People of the State of Vermont respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 5, 1978, and left undisturbed by the appellees' petition for rehearing which was denied on August 7, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, decided on June 5, 1978, is printed as Appendix A hereto and is reported at 579 F2d 141 (2nd cir. 1978). A modification of said opinion is printed as Appendix B hereto.

The unpublished opinion of the United States District Court

for the District of Vermont, filed on October 13, 1977, is printed as Appendix C hereto.

The opinion of the Vermont Supreme Court, filed on June 7, 1977, is printed as Appendix D hereto, and reported as **In re Dunkerley**, 135 Vt. 260, 376 A2d 43 (1977).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment in this case on June 5, 1978. A timely petition for rehearing and reconsideration of the opinion was filed on June 27, 1978, a motion for an extension of time for extended filing having been granted on June 20, 1978. On August 7, 1978, the United States Court of Appeals for the Second Circuit entered its order denying the petition for rehearing. (The order denying the petition for rehearing is printed as Appendix E hereto).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bar retrial of a defendant whose first trial was terminated following a discretionary sua sponte declaration of a mistrial created by the defendant's sudden unforseeable illness?

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> . . . (N) or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

Vermont Rule of Criminal Procedure 43 is set forth in Appendix F.

STATEMENT OF THE CASE

A. Vermont proceedings

On October 13, 1976, the accused was tried by a sequestered jury pursuant to an information for murder in the first degree. The trial took place in the Orleans Superior Court after the parties stipulated to a change in venue from Caledonia Superior Court. After two days of trial activity, including the empaneling and swearing of the jury, opening statements and presentations of testimony, the trial process was interrupted before the third day of trial began. The presiding judge, Silvio Valente, was informed that the defendant was stricken with a partially collapsed lung. The court appointed its own physician to examine the defendant. That physician and two others evaluated and assessed the defendant's condition.

The Court held three conferences with counsel during the morning of October 15th. At the conferences, the Court invited suggestions from the attorneys regarding a resolution of the dilemma created by the defendant's absence. The defense argued that the defendant's illness had caused him to be voluntarily absent in accordance with Vermont Rule of Criminal Procedure 43 (b) (1). Defense counsel also raised the possibility of a continuance for the period of hospitalization and a waiver of further jury sequestration. The defense clearly objected to a declaration of a mistrial; the State remained neutral in that regard.

After consideration of the proposed alternatives, the judge declared sua sponte, a mistrial. Judge Valente found that the defendant's absence was not voluntary in accordance with Vermont Rule of Criminal Procedure 43(b) (1). The Court opined that, because of the seriousness of the nature of the prosecution, a mistrial would serve the interests of justice given the probable length of the trial. Because the predicted period of recovery was not a certainty, the Court declared a mistrial to insure a fair trial for the defendant.

The defense filed a motion for mistrial based on double

jeopardy grounds in reaction to the presence of the murder information on the calendar of the Orleans Superior Court. This motion was denied on November 26, 1976. As a consequence a defense motion for permission to appeal the November 26th decision was filed. This motion was denied on December 3, 1976. A subsequent motion for interlocutory appeal was filed at the Vermont Supreme Court on December 7, 1976. The state Supreme Court declined to review the lower court's decision.

On December 10, 1976, the defense petitioned the Chittenden Superior Court, the jurisdiction in which he was incarcerated while awaiting retrial, by filing a writ of habeas corpus. The petition was denied on January 31, 1977. The defendant appealed the denial to the Vermont Supreme Court which the Supreme Court affirmed on June 7, 1977. **In re Dunkerley**, 135 Vt. 260, 376 A2d 43 (1977).

In that opinion, the State Supreme Court reviewed the law governing the practice of mistrial. The Court found that, in accordance with the seminal case of **U.S. v. Perez**, 9 Wheaton 579, 580 (1824), the Double Jeopardy Clause may permit the exercise of judicial discretion to prevent the doctrine's bar to a second trial when it would defeat the ends of justice. The Court concluded that the trial judge had properly and soundly exercised his discretion when he declared a mistrial.

B. Federal proceedings

On June 14, 1977, a petition for habeas corpus relief was filed in the United States District Court for the District of Vermont. The District Court presided over by Albert Coffrin dismissed the petition on October 13, 1977. Judge Coffrin based his opinion in part on the weighing of the alternatives by the trial judge. The District Court opinion noted the cautious consideration of the parties' positions by the judge. The opinion also remarked on the absence of any wrongdoing by the State on the cause of the mistrial. Given the choices presented to the trial court, the judge cannot be faulted for his exercise of discretion.

Following this opinion and order, the petitioner below filed a motion for a stay pending appeal on October 14, 1977. On November 14, 1977, the District Court stayed the State Court proceedings pending appeal. The petitioner below filed a notice of appeal for review of the petition's denial by the United States Court of Appeals for the Second Circuit. A divided panel reversed the order of the District Court on June 5, 1978. The respondents-appellees filed a petition for rehearing which was denied on August 7, 1978.

The opinion from the Court of Appeals is premised on the conclusion that there was no manifest necessity to justify a mistrial. The opinion faults the absence of judicial findings by which the trial court eliminated the alternative of a continuance.

Judge Moore dissented. He argued that the discretionary standard first applied in **U.S. v. Perez, supra.**, and in force today, as evidenced by **Arizona v. Washington,** 434 U.S. , 98 S.Ct. 824 (1978), is entitled to special weight. Judge Moore stated that the decision of the trial judge was not erratic; alternatives were considered and rejected in accordance with Vermont practice. In Judge Moore's view, Judge Valente's decision was an example of the sound exercise of discretion.

REASONS FOR GRANTING THE PETITION

The decision rendered by the Court of Appeals for the Second Circuit raises many problems in light of the opinions issued by the United States Supreme Court, the Federal Circuit Courts including earlier Second Circuit opinions and the Vermont Supreme Court.

1. The majority opinion in the present case is at odds with a recent United States Supreme Court case. In **Arizona v. Washington, supra.**, the Court determined that a mistrial caused by an improper opening statement by defense counsel need not bar a retrial provided the record displayed a sound exercise of judicial discretion. In the opinion below, the ma-

jority apparently misunderstood the holding in the **Washington** case for the Second Circuit opinion rejected as inadequate a record replete with signs of an active and sound exercise of judicial discretion.

The **Washington** opinion supplied the following guidance:

> (t)he state trial judge's mistrial declaration is not subject to collateral attack in a federal court simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion. **Arizona v. Washington, supra** at 836

A record which discloses a manifest necessity for a mistrial is sufficient to withstand a double jeopardy attack in spite of the absence of explicit findings. Such findings, according to the Court, are not constitutionally required.

The **Washington** opinion explained that the failure to afford special respect to the judgment of the trial court would impede the proper performance of its duty. Should the record disclose irrational judicial conduct, the premise of deference owed to the trial judge would be unfounded. However, a record which contains signs of careful scrutiny and evaluation of alternatives confirms the acknowledgment of respect which should be given by the reviewing court. In the present case, as in the **Washington** case, the trial judge provided an opportunity for counsel to proffer their views. Medical opinion was solicited and obtained. The record reveals an attempt by the lower court judge to evaluate the alternatives to an unforeseen problem.

This same outlook on discretion emerges in **Illinois v. Somerville**, 410 U.S. 458, 462, 93 S. Ct. 1066 (1973), wherein the Court cites with approval the opinions in **Wade v. Hunter**, 336 U. S. 684 (1949), and **Gori v. United States**, 367 U. S. 364 (1961) in support of the view that broad discretion is reserved to the trial judge who is in the best position to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a trial.

The nature of the interruption to the trial proceedings also impacts on the process of appellate review. The **Washington** Court held that

> The strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused. (foot-notes omitted) **Arizona v. Washington, supra.** at 832

When no fault is attributable to the prosecution, a more relaxed level of scrutiny is appropriate. The adoption of this standard is consistent with the importance of providing the prosecution with one complete opportunity to convict a criminal offender.

In contrast, the decision in this case omits any mention of the level of scrutiny to be employed in the review of a case involving an unforeseeable illness which brings about a mistrial. The opinion reflects the use of a strict level of scrutiny in its determination that the mistrial was not a manifest necessity. This determination directly contradicts the Supreme Court's position in the **Washington** case. In that case, the Court acknowledges that the mistrial was not, literally, a necessity. **Arizona v. Washington, supra** at 833. Nonetheless, the policy of the Double Jeopardy Clause was not offended by a retrial. As the Court commented

> retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. **Arizona v. Washington, supra** at 830.

In the instant case the defendant has no right to have his case resolved by a panel whose recollection of the evidence is stale. While the prosecution cannot now demonstrate prejudice which might have infected the jury, desequestered at the defense's request, it is fair to say that the trial judge considered the factors of potential prejudice and stale evidence when he declared a mistrial. His overall conduct on the record supports a result under the **Washington** analysis different from the decision arrived at in the Second Circuit. This conflict can only be resolved by the Supreme Court.

2. The Supreme Court's review is particularly warranted in this case due to the apparent misunderstanding manifested by the Second Circuit in **U.S. v. Grasso**, Docket No. 76-1543, certiorari granted (1978). The divided appellate decision barred retrial under the Double Jeopardy Clause after it held that the trial judge must make explicit findings regarding the absence of reasonable alternatives to mistrial. This judgment was just vacated by the Supreme Court which granted certiorari and remanded the cause in light of **Arizona v. Washington, supra.**, and **U. S. v. Scott**, 437 U. S. (1978).

Prior to the granting of certiorari in the Grasso case, the original panel remained divided, with one judge filing a dissent from the denial of a sua sponte request for reconsideration of the **Grasso** opinion. Judge Timbers expressed his strong feelings against the **Grasso** holding and pointed out the conflict with an earlier circuit case, **U.S. v. Gentile**, 525 F2d, 252 (2nd Cir. 1975), cert. denied 425 U.S. 903 (1976). The **Gentile** opinion had rejected the requirements of alternatives appearing in the record as an unreasonable burden on the trial judge. The **Gentile** court premised its holding on the trial judge who exercises his discretion when the trial process is interrupted. The abandonment of this approach as articulated in **Gentile**, the erroneous position adopted in **Grasso** and the subsequent vacation of that judgment are clear indicators of the existent conflict within the Second Circuit itself. It is submitted that

the Supreme Court must provide definitive guidance in this area.

3. The decision in this case is also in conflict with the holdings of several other federal courts of appeals, its own earlier opinions, and the Vermont Court in its substantive treatment of the illness of a primary participant in the trial process. The appellate courts have affirmed trial judges' declarations of a mistrial when the defendant's mental or physical condition makes it impossible for the trial to continue as scheduled. See **Featherston v. Mitchell**, 418 F2d 582 (5th Cir. 1970).

In **Loux v. United States**, 389 F2d 911 (9th Cir. 1968) the court found that the declaration of a mistrial on the same day as an accident involving injury to a defendant was a matter properly within the sound discretion of the trial court. The mistrial declaration was consistent with the case law compiled in 159 ALR 750.

This same rule has been advanced in **Oelke v. United States**, 389 F2d 668 (9th Cir. 1967) wherein physical incapacity of a juror, the judge, or the accused was treated analogously to jury deadlock, **(United States v. Perez, supra)**.

Health considerations have been peripherially mentioned in **United States v. Jorn**, 400 U.S. 479, 91 S. Ct. 547 (1971).

> (A) criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, e.g. the health of the various witnesses, parties, attorneys, jurors, etc. all of whom must be prepared to arrive at the courthouse at set times . . . it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide. **United States v. Jorn, supra** at 554.

In other circuits the illness of other participants has justified the retrial of the accused. This issue has been examined in **United States v. Potash**, 118 F2d 54, 56 (2nd Cir. 1941), cert. denied, 313 U.S. 584 (1941), wherein a juror became ill. As a consequence the jury was discharged by the sua sponte order of the judge without the defendant's consent. There the Second Circuit upon review declared that the matter of jury discharge is one within the sound discretion of the trial court.

In **United States ex rel Gibson v. Ziegele**, 479 F2d 773, 777 (3rd Cir. 1973), the reviewing court applied the standards of manifest necessity and public justice to a record which reflected the unexpected illness of a key government witness whose incapacity was predicted to last one to two weeks or more. The Third Circuit cited from an earlier case and observed that the defendant's right to case resolution "by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." **Wade v. Hunter**, 336 U.S. 684, 689, 69 S. Ct. 834, 837 (1949). For further support see **Whitfield v. Warden of Maryland House of Correction**, 486 F2d 1118, 1121 (4th Cir. 1973), **U.S. v. Wayman**, 510 F2d 1020, 1028 (5th Cir. 1975).

While the Second Circuit claims its holding is consistent with the cases it sets forth in footnote 7 of its opinion, its holding in this case contradicts the circuit opinions cited therein and above. Their opinion also contradicts the law of the State of Vermont. In **State v. Emery**, 59 Vt. 84, 7 A. 129 (1887), the state Supreme Court commented on the effect of the Double Jeopardy Clause on retrial after the jury was discharged following the illness of a juror.

> But in the event the jury, or court, or prisoner, in the progress of the trial, become unable to proceed with the trial, his jeopardy at once ceases. If it were known when the trial was entered upon that the judge would be stricken down or die, so that there would be no competent court to finish the trial; or that the panel would become disqualified by the sickness or death of one of the jurors; or that the jury would be unable to find a verdict; or that the respondent would be unable to proceed with the trial because of sickness or escape from custody, the respondent would not be put in peril or jeopardy by such commencement of the trial. **State v. Emery, supra** at 88.

Vermont Rule of Criminal Procedure 25, which is entitled Disability of a Judge, addresses the situation of judicial disability after verdict. The Rule does not deal with pre-verdict interruptions due to illness. The Reporter's notes comment on a pre-verdict disability by noting

> (i)n Vermont practice, a trial of sufficient length to require such a substitution is unlikely. A mistrial is the proper remedy for disability occurring during trial. Presumably, a mistrial in such circumstances does not bar reprosecution because the "manifest necessity" recognized as permitting retrial after jeopardy has attached would be found. (Citations omitted) V. R. Cr. P. 25, Reporter's Notes, p. 112.

The Vermont case law in combination with the various circuit opinions clearly illustrates the need for a resolution of the conflict created by the divided panel in its opinion below.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

M. JEROME DIAMOND
Attorney General
State of Vermont

SUSAN R. HARRITT
Assistant Attorney General

APPENDIX A.

Second Circuit Court of Appeals' Opinion,
Docket No. 77-2138, filed June 5, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 608—September Term, 1977.

(Argued January 17, 1978 Decided June 5, 1978.)

Docket No. 77-2138

SCOTT DAVID DUNKERLEY,

Petitioner-Appellant,

—against—

CORNELIUS HOGAN, In his official capacity as Commissioner of Corrections for the State of Vermont, and RICHARD BASHAW, In his official capacity as Superintendent of the St. Albans Correctional Center,

Respondents-Appellees.

Before:

MOORE, SMITH and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court, District of Vermont, Albert W. Coffrin, *Judge,* dismissing a petition for a writ of habeas corpus filed by a criminal defendant whose first trial ended in a mistrial. The petition sought habeas relief on the ground that petitioner's retrial would violate his Fifth Amendment right not to be placed in jeopardy twice for the same offense.

Reversed with directions that the writ issue.

JAMES L. MORSE, Esq., Defender General, State of Vermont, Montpelier, Vt., *for Petitioner-Appellant.*

JOHN C. EVERETT, JR., Esq., St. Johnsbury, Vt. (Dale O. Gray, State's Attorney for Caledonia County, St. Johnsbury, Vt., of counsel), *for Respondents-Appellees.*

MANSFIELD, *Circuit Judge:*

The central issue on this appeal from the denial by the District of Vermont, Albert W. Coffrin, *Judge,* of a writ of habeas corpus is whether the retrial of petitioner-appellant, following a state trial judge's *sua sponte* declaration of a mistrial over petitioner's objection would violate his Fifth Amendment right to be protected against double jeopardy. We hold that it would and reverse the denial of appellant's petition.

The facts are simple and straightforward. On October 13, 1976, the trial of appellant for the first-degree murder of his stepfather began in the Orleans Superior Court, Vermont, before Judge Silvio Valente and a sequestered jury. It was undisputed that appellant had on April 6, 1976, shot and killed his stepfather. The defense was insanity or, in the alternative, diminished capacity arising out of family stress, appellant's pathological dependence on his mother and other causes.

During the first two days of trial the jury heard three witnesses, the most important of whom was appellant's mother, Sandra Downer. She first described the immediate circumstances of the shooting, which occurred in an isolated trailer-home in northern Vermont where three poverty-stricken unemployed people (mother, son and stepfather) lived during the winter in a state of semi-confinement and

tension, with the stepfather evidencing a dislike for the stepson. On direct and cross-examination Mrs. Downer gave in detail a lengthy and sympathetic account of appellant's background, beginning with his harrowing experiences as a child. According to his mother, appellant had frequently been brutally beaten and mistreated as a child by his real father, an alcoholic, with the result that appellant often suffered bleeding from the ears and hardness of hearing. She testified that her son had been withdrawn as a child, isolating himself from contact with other children. He had a chronic stutter, and had to be fed occasionally by his mother until he was nearly 12 years old. This situation did not improve with the mother's second marriage, this time to another alcoholic, which resulted in a second divorce. In the meantime appellant got into trouble in his early teens, and was confined in state reformatories twice for a total of nearly two years. His mother married for a third time, but this marriage also proved to be an unhappy one, resulting in beating of the mother by her third husband, the eventual victim of the homicide for which appellant was indicted and brought to trial.

The mother further testified that at her invitation and with her husband's consent appellant moved in with the mother and stepfather. Fights between appellant and stepfather developed and on occasion appellant would evince peculiar expressions or mannerisms. The son, according to his mother's testimony, suffered from "dreams and fantasies" and on the night of the homicide "didn't know what he was doing." Shortly prior to the homicide the mother and stepfather had an argument in the trailer in appellant's presence about allowing the mother to telephone her daughter, which ended with the mother stating that she and her son should go somewhere else where no one would tell her what to do. Shortly thereafter, the stepfather telephoned

the police, reporting that he wanted appellant "out of the house." The shooting occurred a few moments later.

On the morning of the third day of trial appellant was hospitalized with a 15% collapsed lung. Three doctors, including one appointed by the court, concurred in the view that hospitalization would be required for a period of from 7 to 10 days, a prognosis that turned out to be correct.[1] Confronted with this development, the trial judge asked for the views of counsel as to whether a mistrial should be declared. Appellant's attorney strongly opposed a mistrial on the grounds that the delay and second trial would be an "enormous psychological hardship" on Dunkerley and his mother, and would subject him to double jeopardy. It was later disclosed that appellant was satisfied with the testimony that had been given by the mother and that "in the opinion of the defense the trial was going particularly well for the defendant." Defense counsel suggested that in lieu of being subjected to repetition of the trauma already experienced his client would be prepared to waive presence at the trial during the period of hospitalization pursuant to Rule 43(b), Vt. Rules of Crim. Procedure.[2]

The defendant's suggestion was vigorously opposed by the prosecutor who stated that "under no circumstances"

1 Appellant was returned to prison after 10 days of hospitalization. As Judge Coffrin later observed, "There is no indication that the disability was in any way induced by petitioner."

2 Rule 43(b)(1) of the Vt. Rules of Crim. Procedure in pertinent part provides:

> "(b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,
>
> "(1) in noncapital cases, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial."

Although Dunkerley was charged with first degree murder, this is a noncapital crime in Vermont, the punishment for which is life imprisonment. 13 Vt. Stat. Ann. §2303.

would the State proceed without the defendant being present and suggested that the defendant's absence in the hospital could not be treated as "voluntary" within the meaning of Rule 43(b)(1), Vt. Rules of Crim. Procedure, so that the trial could not proceed without him. Thereupon defendant's counsel suggested as an alternative that the jury, with his client's consent, be de-sequestered, which would permit it to go home, and that trial be suspended for the 7 to 10-day period during which the defendant would be confined to the hospital, following which trial could be resumed or the situation reviewed to determine whether a mistrial would be appropriate. The prosecutor, although refusing to move for a mistrial, took no position with respect to this proposal but suggested that the trial judge might declare a mistrial because "Jeopardy is not effected [sic] by the Court on its own motion declaring a mistrial."[3] The defense, on the other hand, stated that "if he [Dunkerley] is able to come back 7 to 10 days that would not be an undue delay and our position is that he has been placed in jeopardy here and that any subsequent trial would be double jeopardy."

The trial judge, after a 10-minute recess, announced that "the Court of its own motion is going to declare a mistrial," to which the defendant's attorney objected. The jury was called in, advised of the court's action and discharged. The only reason given by the court for its action was a general statement that "in order to insure a fair trial for the defendant here, . . . the Court felt in the interest of justice that a mistrial should be declared." Judge Valente also stated that he had taken into consideration the fact that it would not be a very lengthy trial and advised the jury "I don't think I have any alternative to

3 This statement was clearly erroneous. Upon the improper *sua sponte* declaration of a mistrial by the trial judge, retrial is precluded by the Double Jeopardy Clause, *United States* v. *Jorn*, 400 U.S. 470 (1971).

fairness to both the respondent and the State. I have to declare a mistrial." No mention was made by the Court of the alternative of a continuance, which had been proposed by appellant's counsel and not objected to by the prosecutor. Nor was any reason given for rejecting that alternative.

Dunkerley next moved to dismiss the indictment against him on double jeopardy grounds, which was denied. When the Vermont Supreme Court denied him leave to file an interlocutory appeal, he filed a petition for habeas corpus in the Chittenden Superior Court, which was denied, then he appealed that decision to the Vermont Supreme Court, which affirmed the denial of the writ in an opinion dated June 7, 1977. *In re Dunkerley*, 376 A.2d 43 (Vt. S.Ct. 1977). The Vermont Supreme Court held that the defendant's absence from trial was not voluntary and that the trial court could not exercise its power under Vt. Rules Crim. Procedure 43(b) to conduct the trial during his absence, but that, assuming the defendant could waive his constitutional right to be present, the trial court had acted within its discretion in refusing to continue without Dunkerley since the defense was insanity and "the jury's observation and evaluation of him with respect to his mental condition" was a factor that might be taken into account by the jury. The court did not discuss the question of whether, in lieu of a mistrial, Judge Valente should have suspended trial for 7 to 10 days until Dunkerley was released from the hospital and could be present.

Having exhausted his state remedies, Dunkerley then petitioned the federal district court for the District of Vermont for habeas corpus. On October 13, 1977, Judge Coffrin, dismissing the petition, concluded that since the trial judge had been made aware of all the circumstances, including the alternatives to a mistrial, and neither the prosecution nor a government witness was the chief cause

of the interruption of the trial, the declaration of a mistrial was not clearly erroneous or an abuse of discretion. He further held that Vt.R.Cr.P. 43(b)(1) merely allowed the court to continue with a trial in the defendant's absence under certain circumstances and "does not give a defendant the right to have his trial proceed without him." Finally, Judge Coffrin concluded that the defendant's right to waive confrontation of witnesses did not carry with it the right to insist on the trial proceeding without him. From this dismissal Dunkerley appeals.

Discussion

The general principles by which we are governed, in determining whether retrial following declaration of a mistrial over a defendant's objection would violate his Fifth Amendment right[4] to be protected against double jeopardy, are well settled. Once jeopardy has attached, the defendant has a valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949) (quoted with approval by the Supreme Court in *United States* v. *Jorn*, 400 U.S. 470, 484 (1971), *Illinois* v. *Somerville*, 410 U.S. 458, 466 (1973), and *Arizona* v. *Washington*, —— U.S. ——, 46 U.S.L.W. 4127, 4129 (Feb. 21, 1978)). The purpose of the Double Jeopardy Clause is not merely to insure against harassment of an accused through repeated efforts by the Government to obtain a conviction after an acquittal, but also to protect the defendant against continued exposure to anxiety, embarrassment, expense and restrictions on his liberty that might be caused by aborting one trial to commence another.

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4 The double jeopardy provision of the Fifth Amendment, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" applies to the states through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

"Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." (Footnotes omitted). *Arizona* v. *Washington,* —— U.S. ——, 46 U.S.L.W. at 4129 (Feb. 21, 1978).

Against the defendant's right to have his trial completed before a particular tribunal there must be balanced the public interest in insuring that the prosecutor be accorded one full opportunity to present his case against the accused and that both sides receive a fundamentally fair trial. Recognizing this, the Supreme Court, in an early landmark decision by Mr. Justice Story, held that a trial court may discharge a jury without precluding a new trial when, after "taking all of the circumstances into consideration" and exercising "sound discretion", it determines "that there is a manifest necessity for the act [declaration of mistrial], or the ends of justice would otherwise be defeated." *United States* v. *Perez,* 9 Wheat. (22 U.S.) 579 (1824).

The types of situation that might constitute "manifest necessity" or defeat "the ends of justice" unless a mistrial is declared are obviously too many and varied to be catalogued or to permit establishment of precise formulas or rigid rules of thumb. A great deal of discretion must therefore be vested in the trial judge, who is usually best situated to determine the degree of necessity for the declaration of a mistrial when an unexpected event occurs during a trial. For these reasons "we accord the highest degree of respect to the trial judge's evaluation," *Arizona* v. *Washington,* 46 U.S.L.W. at 4131 (Feb. 21, 1978).

On the other hand, from the outset the Supreme Court has cautioned that "the power [to declare a mistrial] ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes," *United States* v. *Perez,* 9 Wheat. (22 U.S.) at 579. More recently, the Court has construed "manifest necessity" as meaning a "high degree" of necessity "before concluding that a mistrial is appropriate," *Arizona* v. *Washington,* —— U.S. ——, 46 U.S.L.W. at 4130 (Feb. 21, 1978), and has warned that

"[I]n view of the importance of the right [to have the trial concluded by a particular tribunal] and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." (Footnote omitted). 46 U.S.L.W. at 4129.

Although findings of fact or a statement of the trial court's reasons for the declaration of a mistrial are not constitutionally mandated, the failure of the record to provide adequate support for the trial judge's action may bar a retrial.

It is not enough that plausible reasons might conceivably exist for the trial judge's action. If we are to review his exercise of discretion, to which deference should ordinarily be accorded, we must know the basis for that decision as "disclosed by the record," including "argument of counsel

prior to the judge's ruling." *Id.*, at 4132.[5] For instance, a retrial has been barred by the Double Jeopardy Clause where the record revealed that a mistrial was declared (1) to permit the Government to make further efforts to secure the presence of a key witness who had not been subpoenaed prior to commencement of trial, *Downum* v. *United States*, 372 U.S. 734 (1963); (2) because the trial judge believed that government witnesses had not been adequately warned of their Fifth Amendment rights, *United States* v. *Jorn*, 400 U.S. 470 (1971); or (3) on the ground that there had been an implicit acquittal by a verdict rendered by the first jury on a related charge, *Green* v. *United States*, 355 U.S. 184 (1957). On the other hand, the discretion of the trial court to declare a mistrial has been upheld where the record showed that (1) the first jury could not agree, *United States* v. *Perez*, *supra*; *Logan* v. *United States*, 144 U.S. 263 (1892); *Keerl* v. *Montana*, 213 U.S. 135 (1909); (2) one of the jurors was found to be biased against a party after the commencement of trial, *Wade* v. *Hunter*, 366 U.S. 684, 689 (1949); (3) there was misconduct or anticipated misconduct by the prosecutor at the first trial, *Gori* v. *United States*, 367 U.S. 364 (1961), or by defense counsel, *Arizona* v. *Washington*, *supra*, which would render the first trial unfair; or (4) a fatal

5 In *United States* v. *Grasso*, 552 F.2d 46 (2d Cir. 1977), we held that "before a trial judge declares a mistrial, he must make explicit findings, preferably after a hearing, that there are no reasonable alternatives to mistrial." *Id.* at 52. The Supreme Court's decision in *Arizona* v. *Washington*, —— U.S. ——, 46 U.S.L.W. 4127 (Feb. 21, 1978), indicates that at least with respect to a state defendant seeking federal habeas, a "state trial judge's mistrial declaration is not subject to attack . . . simply because he failed to find 'manifest necessity' in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion." *Id.* at 4132 (footnote omitted). Where "the record provides sufficient justification for the state court ruling, the failure to explain that ruling more completely does not render it constitutionally defective."

defect in the indictment would in any event require that a conviction be set aside, *Illinois* v. *Somerville*, 410 U.S. 458 (1973).

Turning to the present case, our task as a reviewing court is to determine first, whether the basis for the trial judge's mistrial order in this case, which includes no explicit finding of manifest necessity, is adequately disclosed by the record; and secondly, we must determine whether the trial judge's exercise of his discretion was sound. It is undisputed that jeopardy had attached once the jury was sworn and testimony was taken. Although a short trial was anticipated, a key witness, Mrs. Downer, had testified at length under both direct and cross-examination. It is further beyond question that the defendant objected vigorously and repeatedly to the declaration of a mistrial, both before and after it was declared, expressly asserting his rights under the Double Jeopardy Clause and offering to waive his presence or to consent to a 7 to 10-day continuance until his anticipated return from hospitalization.

Neither the record nor the parties suggest any reason why the continuance proposal, with the jurors free to return home until resumption of trial, would not have been a feasible and practical solution to the problem. There is no evidence that the jury would thereby have been exposed to prejudicial publicity. Indeed, the record is silent as to whether the case received any publicity at all. The unlikelihood of prejudicial publicity would not be surprising, since Dunkerley conceded that he had killed his stepfather, and none of the persons or witnesses involved appear to have been public figures. The sole issue remaining to be tried was a narrow one, whether Dunkerley possessed at the time of the homicide the requisite mental capacity.

Unlike the situation in *Arizona* v. *Washington*, *supra*, where the prosecutor repeatedly moved for and vigorously

urged a mistrial based on defense counsel's prejudicial statements to the jury, the State here did not object to a 7 to 10-day continuance and did not seek a mistrial. Nor did it, faced with the burden of proving "manifest necessity" in view of Dunkerley's objections, offer evidence of any other factors militating against the continuance proposal, such as Vermont legal prohibitions, or proof that because of other commitments a 7 to 10-day continuance would work an undue hardship upon court, jury, counsel or the prosecutor. Indeed, the practice of granting such continuances because of unexpected developments during the course of a jury trial is commonplace in many jurisdictions.

Nor did the trial judge, in declaring a mistrial, suggest that the alternative of a short continuance would be unfeasible, unfair to the parties, violative of any state law or practice, or unreasonable under the circumstances.[6]

6 Judge Moore's dissent speculates that the trial judge may have opted for a mistrial rather than a continuance (which would have entailed de-sequestration of the jury) because sequestration is "generally favored in *all* serious criminal cases" in Vermont. *Infra*, p. 3335. However, no Vermont statute or rule of practice prevented the trial judge in this case from de-sequestering the jury. Nor did the Vermont Supreme Court, possessed as it is of expertise in Vermont law, suggest that the trial judge's action could be justified on such a basis.

On the contrary, it has stated that the "propriety of separation of juries in any given situation is not a matter specifically dealt with by our statutes. The governing rules have derived from practices developed by our courts over their long history." *State* v. *Brisson*, 124 Vt. 211, 201 A.2d 881, 882 (1964).

The "governing rule" in a noncapital case such as this one would have prevented de-sequestration of the jury only if the defendant objected. *State* v. *Anderson*, 119 Vt. 355, 125 A.2d 827, 831 (1956), cited with approval in *State* v. *Brisson*, *supra*, at 883. The record clearly shows that Dunkerley's counsel actually opposed sequestration of the jury from the outset of the trial. (Joint App. 7-9). The record also shows that neither party, nor the court, considered that any legal prohibition stood in the way of de-sequestration when that alternative was proposed by the defense. Therefore, de-sequestration was a course of action entirely available to the trial judge, and not an alternative that was either disfavored, or of questionable validity, because of Vermont law or practice.

Judge Valente merely stated, after taking a short period to consider the alternatives proposed by the parties, that he was declaring a mistrial in fairness to the defendant. We recognize that where the record discloses plausible reasons supporting the declaration of a mistrial the trial judge may not be required to state his reasons. *Arizona* v. *Washington*, —— U.S. ——, 46 U.S.L.W. at 4132. However, we "have an obligation to satisfy [ourselves] that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.*

We do not suggest that the trial judge in this case acted impetuously. Cf. *United States* v. *Jorn*, 400 U.S. 458 (1973). When the problem of petitioner's illness arose, he conferred with counsel and gave each a fair opportunity to explain his situation with regard to how the trial should proceed. But the apparent availability of at least one alternative to a mistrial—adjourning the trial for 7 to 10 days—leads us to conclude that a mistrial was not a "manifest necessity." In the absence of any record evidence or statement by the court indicating why a short continuance would have been unreasonable, unfair, or impractical, we decline to speculate as to factors that the trial judge might possibly have considered, sr h as the "freshness" of the evidence. On this record the declaration of a mistrial cannot properly be sustained, over appellant's objection, as having been required by a "high degree" of necessity.[7]

7 We disagree with our dissenting colleague's characterization of the holding of this case. We do not decide that it is an abuse of discretion for a trial judge to declare a mistrial when a defendant's "sudden illness require[s] a lengthy period of hospitalization." No such lengthy period of hospitalization is at issue here. According to the record, the defendant was estimated to be absent for 7-10 days. This prognosis turned out to be correct. What we hold today is that we cannot approve the declaration of a mistrial when the record does not indicate that the mistrial was manifestly necessary, in light of the relatively brief interruption in the trial caused by the defendant's illness, and the availability of another alternative to the mistrial declaration.

(footnote continued on following page)

We reverse and direct that the writ issue, with directions that the indictment be dismissed.

MOORE, *Circuit Judge* (Dissenting):

The majority today holds that a state trial judge abused his discretion when he halted the trial of a murder defendant whose sudden illness required a lengthy period of hospitalization. I believe that the situation could properly have been found to constitute such "manifest necessity" as is required by the Constitution to permit a retrial, and I accordingly dissent from my colleagues' substitution of their after-the-fact judgment for that which was responsibly exercised by the trial judge.

In reaching my conclusion that the Double Jeopardy Clause does not bar a retrial in this case, I start with the proposition that has remained basic to this area for

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(footnote 7 continued)

Although we do not reach the question of whether or under what circumstances it would be proper for a trial judge to declare a mistrial because of a defendant's *lengthy* absence, the cases cited by Judge Moore in his dissent indicate some of the circumstances involving a defendant's or juror's incapacity that have necessitated a mistrial. See *United States* v. *Potash*, 118 F.2d 54 (2d Cir. 1941) (mistrial declared when juror became incapacitated after deliberations had begun); *Gardes* v. *United States*, 87 F. 172 (5th Cir. 1898) (mistrial declared after juror had become totally and permanently disabled); *Featherston* v. *Mitchell*, 418 F.2d 582 (5th Cir. 1969) (mistrial declared when trial court became aware that defendant might not be competent to stand trial, and ordered extended hospitalization and psychiatric observation); *United States* v. *Stein*, 140 F. Supp. 761 (S.D.N.Y. 1956) (one defendant severed from trial when she required "major" operation and 3-4 month convalescence).

In all of these cases, the declaration of a mistrial was approved because circumstances occurred that rendered continuation of the trial infeasible, i.e., a "manifest necessity" justified aborting the trial. We consider our decision today to be consistent with these cases, as well as the other well-settled precedents applicable to cases of this kind. See pp. 3325-3329, *supra*.

over 150 years, ever since it was first applied in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824):

> "[I]n all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

This "discretionary" standard has remained the governing standard to this day, as is evident from the Supreme Court's recent opinion in *Arizona* v. *Washington*, —— U.S. ——, 46 U.S.L.W. 4127, 4132 (1978), which emphasized that a trial judge's determination to grant a mistrial "is entitled to special respect", *id.* at 4131, and to which the majority paid no heed in deciding as it did. In *Washington*, a mistrial had been declared without a statement of reasons and over the defendants' objections because defense counsel had interjected improper comment in his opening address. The Supreme Court held that a retrial should be permitted despite the fact that "some trial judges might have proceeded with the trial after giving the jury

appropriate cautionary instructions" instead of having halted the trial. *Id.* The Court quite candidly acknowledged that "[i]n a strict, literal sense, the mistrial was not 'necessary.'" *Id.* Yet, the majority could not say that the trial judge's decision to abort the trial constituted such an unsound exercise of discretion as to preclude a new trial and, indeed, the Court suggested, *see id.*, that the application of something less than the "strictest" of "scrutiny" was appropriate in a case where the mistrial ruling was predicated neither on the state's misconduct nor any charge of careless preparation on its part—when the potential for harassment, the major consideration underlying the double jeopardy protection, *see Green* v. *United States*, 355 U.S. 184, 187-88 (1957), is simply not involved.

The same standard of deference applied in *Washington* is appropriate in this case. No one has even suggested an improper motive on the part of the prosecutor in this case. Rather, the precipitating disruptive factor necessitating a mistrial was the defendant's illness which, unfortunate as it was, was in no way chargeable to the state. Nowhere was the state's preparedness challenged; yet, its interest in having "one complete opportunity to convict", *Arizona* v. *Washington*, *supra*, 46 U.S.L.W. at 4130, has now been compromised by my colleagues in the majority, only because of their disagreement with the alternative chosen by the trial judge.

Nor was the trial judge's conduct in this case "erratic" or precipitous—the factor tipping the scales in *United States* v. *Jorn*, 400 U.S. 470 (1970), as was emphasized in both *Illinois* v. *Somerville*, 410 U.S. 458, 469 (1973), and, more recently, in the *Washington* case itself, 46 U.S.L.W. at 4132. Rather, in this case, the trial judge solicited alternatives, considered them, and rejected them as inadequate.

The majority rules, however, that because the record is silent as to prejudicial publicity, and because no statement

of reasons was given for rejecting the proposal for a continuance pending the defendant's hospitalization (with the concomitant de-sequestration of the jury during the hiatus), the judge committed error in failing to adopt that alternative in this case. As to the lack of a statement of reasons, the majority concedes (see majority opinion, *ante* at page 3331) that *Washington* has made it clear that no reasons need be stated on the record, 46 U.S.L.W. at 4132, as long as plausible reasons exist in support of the mistrial ruling. I am satisfied that the judge acted well within proper bounds in ruling as he did.

First, his decision rejecting de-sequestration as an alternative was entirely consistent with Vermont practice, under which sequestration is generally favored in *all* serious criminal cases. *See State* v. *Anderson*, 119 Vt. 355, 125 A.2d 827, 830-31 (1956); *State* v. *White*, 120 Vt. 220, 223, 274 A.2d 690, 694 (1971). In a state which favors sequestration, such procedure would seem to be an appropriate prophylactic safeguard to prevent extra-evidentiary information from prejudicing the verdict. It is no answer to the trial judge in *this* case that in fact there was no likelihood of publicity, for the seriousness of the crime itself suggested that precautions must be taken. Therefore, I vigorously dissent from the majority which holds that the action of the trial judge, in adherence to the common understandings of criminal practice in his state, was "abusive" as a matter of federal constitutional law.

Even if, in an exercise of prescience, the trial judge should have foreseen that de-sequestration would pose no problems because, as the majority points out, publicity was not "likely", nonetheless the judge's rejection of the continuance alternative was sound and justifiable. In fact, Judge Valente's concerns in rejecting the proposal were quite adequately indicated on the record. After the judge

solicited suggestions from counsel and ascertained defendant's condition, he reported to counsel that the defendant's treating physician had confirmed the prognosis that Dunkerley "should be confined 7 to 10 days. If he gets worse of course he will be there a lot longer." The judge then explained:

> "I want to state upon the record that although the Court realizes this is a very serious case . . . it will not be a very lengthy case when it is ultimately tried so that is one of the considerations that the Court had in mind in declaring a mistrial. That in order to insure a fair trial for the defendant here, that the Court felt in the interest of justice that a mistrial should be declared. The Court further finds of course that it wasn't any voluntary absence here." (Joint Appendix at 20).

While the majority does not seriously dispute the "voluntary absence" issue, a matter essentially requiring interpretation of Vermont law, it finds nothing in the judge's statement, nor on the record as a whole, to support the judge's refusal to grant a continuance. However, the judge's concerns were voiced only after defense counsel had argued that no prejudice would result as a consequence of the probable 7 to 10 day hiatus "between the taking of evidence". (Joint Appendix at 19). It seems to me quite obvious that it could create no small concern that, at a minimum, a 7 to 10 day hiatus would intervene between the "taking of evidence" in a murder case such as this. Potentially, each juror could be required to wait even longer than 10 days before being permitted to consider the evidence already given by defendant's main witness and to weigh it against the fresher evidence to be offered by experts, as well as by the defendant himself, after his return. *Any* continuance would raise a potential that the

jurors' reactions to the earlier evidence would be tempered by other, extra-evidentiary considerations; in a serious murder case such as this, where the length of the hiatus exceeds the length of the trial, the trial judge, who is in the best position to evaluate the abilities of the particular jurors to pay heed to the evidence alone, should be permitted to exercise all the procedural control he thinks necessary to promote a just judgment.

In concluding that the trial judge's conduct of this case was unsupportable under the law of double jeopardy, the majority has effectively created a constitutionally mandated rule that a state trial judge *must* grant a continuance if requested by a stricken defendant because his right to proceed with the jury of his choice is paramount. I am mindful of the importance to a defendant of his right to proceed with the jury he has preferred, but it is a right that has never been thought absolute. Indeed, it has been held no bar to retrial in cases, including one in our own circuit, where a mistrial had been declared due to the mid-trial illness or incapacity of a juror in the case. The judge may discharge the jury even if the defendant desires to proceed with only the eleven remaining jurors from his chosen panel, and even if the state consents. *See Parker* v. *United States*, 507 F.2d 587 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States* v. *Potash*, 118 F.2d 54, 56 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941) (trial judge has discretion under *Perez*); *Gardes* v. *United States*, 87 F. 172, 177 (5th Cir.), *cert. denied*, 171 U.S. 689 (1898). The *Perez* discretionary standard was invoked in support of all these trial decisions to discharge the panel and begin anew, as it was cited to support retrial in cases where the defendant had become incapacitated or ill, as in this case. *Featherston* v. *Mitchell*, 418 F.2d 582 (5th Cir. 1969), *cert. denied*, 397 U.S. 937 (1970); *United States* v. *Stein*, 140

F. Supp. 761 (SDNY 1956) (*Perez* and *Potash* cited). *See also,* Annot., 159 A.L.R. 750.

The majority's new "rule", though, would seemingly require that a continuance be granted for any illness, even if the trial judge himself were to fall ill, since the defendant would be deprived of his right to proceed with the first jury were a new trial to be ordered. However, the Vermont Rules of Criminal Procedure themselves suggest that the sudden disability of a judge would create a "manifest necessity" for a mistrial ruling. The Reporter's Notes to Rule 25 explain that no provision has been made for substituting another judge in the event of disability during a criminal trial because under Vermont practice it is unlikely that there will be many trials of sufficient length to require such provision. The Reporter then suggests:

> "A mistrial is the proper remedy for disability occurring during trial. Presumably, a mistrial in such circumstances does not bar reprosecution because the 'manifest necessity' recognized as permitting retrial after jeopardy has attached would be found. See United States v. Perez, . . . ; Illinois v. Somerville. . . ." (V.R.Cr.P. 25, Vt. Stat. Ann. (1974)).

Whether it is the judge, a juror, or the defendant himself who suddenly falls ill, the trial has been disrupted severely, and itself has been jeopardized, much the same as if prejudicial comment has been injected into the proceedings. A judge must then pick up the pieces of the proceedings, and must choose the most appropriate course to assure fair proceedings; he is in a unique situation—a situation not shared by my colleagues who face only a cold written record. I think it well within a trial judge's sound discretion to decide to begin anew under such circumstances; his decision must be upheld as long as it rests on sound rules

of state practice and conscientious deliberation. As the Court said in *Illinois* v. *Somerville,* 410 U.S. at 468:

> "We believe that in light of the State's established rules of criminal procedure, the trial judge's declaration of a mistrial was not an abuse of discretion. Since this Court's decision in *Benton* v. *Maryland,* . . . federal courts will be confronted with such claims that arise in large measure from the often diverse procedural rules existing in the 50 States. Federal courts should not be quick to conclude that simply because a state procedure does not conform to the . . . federal . . . rule, it does not serve a legitimate state policy."

In *Arizona* v. *Washington,* the Supreme Court declared that the "overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation" of the particular problem which threatens the proceedings, and that we refrain from second-guessing a trial ruling made after rational consideration of the alternatives. *Washington* itself permitted retrial even though the Court acknowledged that a different trial judge may have chosen a different course, perhaps to "cure" the prejudicial statements by cautionary instructions. Deference, however, was paid to the trial judge's ability to assess the jurors' reactions to the proceedings and his responsible conduct in acting as he did. Though in a "strict . . . sense, the mistrial was not 'necessary' " in *Washington,* 46 U.S.L.W. at 4131, the necessity was sufficiently manifested so that the Constitution would not be offended were a retrial to proceed.

The situation is not different in this case. The serious illness of the defendant caused an emergency situation requiring a sound decision as to the proper course to pursue. The trial judge acted with the motivation to ensure that

the defendant and the state would have a fair trial, and his rulings conformed with standards of practice long established in his state. To hold that such conduct is an abuse of discretion is not only to ignore the teachings of the *Perez* case, which has been the governing standard since 1824, and which has formed the basis for many holdings supporting discretionary mistrials in this circuit and elsewhere, but it is also contrary to the Supreme Court's latest holding in *Washington*—that discretion, especially that of judges of the various states, is to be respected when honestly and soundly exercised.

By their decision the majority creates a federal-appellate-judge-made-rule of trial procedure having little regard for the exigencies of the trial. The majority's position in my opinion is at odds with the law and a usurpation of the powers vested in the trial judges of the various states. I therefore dissent.

APPENDIX B.

Modification of Second Circuit Court of Appeals' Opinion, Docket No. 77-2138, filed June 22, 1978

UNITED STATES COURT OF APPEALS

Second Circuit

United States Courthouse

Foley Square, New York 10007

Dunkerley v. Hogan — September Term 1977

Docket No. 77-2138 — Decided June 5, 1978

Page 3332, lines 1 and 2 — delete entirely and insert "We reverse and direct that the writ issue." in place thereof.

A. DANIEL FUSARO
Clerk

APPENDIX C.

District Court for the District of Vermont,

Docket No. 77-140, filed on October 13, 1977

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Scott David Dunkerley

v.

Civil Action

Cornelius Hogan, in his official capacity as Commissioner of Corrections for the State of Vermont, and Theodore Allen, in his official capacity as Superintendent of the St. Johnsbury Community Correctional Center

File No. 77-140

Filed October 13, 1977

OPINION AND ORDER

This is a petition for habeas corpus brought on the grounds that retrial of the petitioner after his first trial ended in a mistrial declared **sua sponte** by the trial judge, would violate the double jeopardy clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment. **Benton v. Maryland,** 395 U. S. 784 (1969). The outcome of this case conceivably could be affected by the Supreme Court's decision in **Arizona v. Washington,** 546 F.2d 829 (9th Cir. 1976), **cert. granted,** 97 S. Ct. 1643 (1977), in which the Ninth Circuit granted habeas corpus relief where the trial court had

declared a mistrial without indicating whether it considered the efficacy of alternatives to mistrial. Because petitioner here seeks release from confinement, we are unable to wait for that decision but must act on this petition expeditiously.

On October 13, 1976 petitioner was brought to trial for the first degree murder of his stepfather. After two days of trial, petitioner was hospitalized because of a partially collapsed lung. There is no indication that the disability was in any way induced by petitioner. Upon learning of the hospitalization, the trial court had three conferences with prosecution and defense counsel at which he solicited their recommendations as to how to proceed. Defense counsel requested either a continuance for the seven to ten days petitioner's doctors anticipated he would be incapaciated, or a voluntary waiver by petitioner of further appearance under Vermont Rule of Criminal Procedure 43(b) (1). Counsel told the court that he wanted to avoid a second trial because a mistrial would greatly prejudice petitioner's rights, testifying caused petitioner's mother "enormous psychological hardship", and having to go through two trials would cause petitioner hardship.[1] Here petitioner alleges in addition that he desired to continue the trial because he wanted a speedy trial and because "in the opinion of the defense the trial was going particularly well for the defendant."[2]

At the time when declaration of a mistrial was being considered, petitioner's mother had already testified regarding the events of the night of the shooting and regarding her relationship with her son, his childhood, his dependence upon her and the animosity between him and his stepfather. The state had indicated that it intended to call two psychiatrists, several police officers, some laboratory personnel and the chief medical examiner. The defense had indicated that it intended to call petitioner and two other psychiatrists.

1. October 15, 1976, transcript at 3, 7, and 10.
2. Petitioner's Memorandum of Law, filed June 27, 1977, Civ. No. 77-140, at 10 and 8.

In response to the alternatives suggested by counsel for the defense, the prosecution told the court the state would not proceed without petitioner's presence, and suggested that the court might declare a mistrial **sua sponte.** The prosecution refused to move for mistrial itself without researching whether double jeopardy would bar retrial. Approximately two hours after learning of the hospitalization, the trial judge declared a mistrial because he felt the case would not be very lengthy when ultimately tried, and that a mistrial was necessary "in order to insure a fair trial for the defendant" and "in the interest of justice."[3] He advised the jury that he did not see any other alternative in fairness to both the respondent and the state.[4]

Subsequently the trial court dismissed petitioner's motion to dismiss on grounds of double jeopardy and denied, as did the Vermont Supreme Court, his motion to file an interlocutory appeal. A petition for writ of habeas corpus filed in Chittenden Superior Court was denied with written findings on January 31, 1977, and affirmed by the Vermont Supreme Court. **In re Dunkerley,** No. 56-77 (Vt. Sup. Ct. June 7, 1977). For reasons set out below, we deny the petition.

Before embarking on a discussion of petitioner's arguments, we should note that there is no question but that jeopardy had attached when the mistrial was declared. The jury had been selected and sworn and evidence had been taken. **Downum v. United States,** 372 U. S. 734 (1963). Also, as pointed out by the Vermont Supreme Court in its June 7, 1977 opinion, the guiding principle in the law of mistrial is that the double jeopardy clause does not bar retrial where courts "discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." **United States v.**

3. October 15, 1976 transcript at 9.

4. **Id.** at 11.

Perez, 22 U. S. (9 Wheat.) 579, 580 (1824) (Story, J.). As the United States Supreme Court has cautioned, the principle of **Perez** does not allow for rigid categorization of circumstances in which mistrial bars reprosecution. Rather judicial discretion must be exercised to further the ends of public justice. **United States v. Jorn,** 400 U. S. 470, 485-86 (1971); **accord, Wade v. Hunter,** 336 U. S. 684, 691 (1949).

Petitioner's first argument is that habeas corpus relief should be granted because the mistrial was not in the "sole interest of the defendant." Leaving aside the fact that the viability of this test has been questioned, **United States v. Grasso,** 552 F.2d 46, (2nd Cir. 1977), **petition for cert. filed,** 46 U. S. L. W. 3089 (U. S. May 6, 1977) (No. 76-1543). the three cases upon which petitioner relies for this argument do not require a grant of habeas corpus relief in the case before us. First **Gori v. United States,** 367 U. S. 364 (1961), is support for the converse proposition: When a mistrial is declared solely in the interest of the defendant, the Court will not hold that a retrial is necessarily barred. **Id.** at 369. The **Gori** Court emphasizes that the trial judge's exercise of his discretion to declare a mistrial will not be "scrutinize(d) with sharp surveillance". **Id.** at 368.

Second, the Court in **United States v. Jorn,** 400 U. S. 470 (1971), holds that reprosecution would constitute double jeopardy. A plurality of the Court found that the trial judge abused his discretion by declaring a mistrial for dubious reasons and without ever considering the possibility of a trial continuance or giving either side the opportunity to object to his ruling. Although the Court first seems to indicate that double jeopardy prohibits reprosecution unless mistrial is declared "in the sole interest of the defendant," the Court subsequently states that "a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision." **Id.** at 483. Again the Court emphasizes that the trial

judge must weigh all the circumstances to determine whether there is a "manifest necessity" for a **sua sponte** declaration of a mistrial. Specifically, the trial court must consider the lack of preparedness of the government, the potential risks of abuse by the defendant of society's unwillingness to subject him to repeated prosecutions unnecessarily, and the importance to the defendant of being able to go to verdict with a jury he might believe to be favorably disposed to his fate. **Id.** at 485-86.

Finally, in **United States v. Glover**, 506 F.2d 291 (2d Cir. 1974), the court reversed Glover's conviction, arguing that the plurality opinion in **Jorn** restricted **Gori** to cases where the trial judge was acting in the "sole" interest of the defendant. The **Glover** court found that the thrust of **Jorn** is that "where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection." **Id.** at 297. Note, however, that the Supreme Court in **Illinois v. Somerville**, 410 U. S. 458 (1973), warns against divorcing the language of **Jorn** from its facts which were that the action of the trial judge could "fairly be described as erratic", and notes that **Jorn** "did not hold that (the defendant's right to proceed before the first jury) may never be forced to yield . . . to 'the public's interest in fair trials designed to end in just judgments.'" **Id.** at 469-70.

The **Glover** court found the following facts to support its reversal: The mistrial was granted for the benefit of Glover's codefendants; Glover had done nothing to bring about the mistrial; the prosecutor had requested a mistrial; the government had inadequate proof to proceed with trial; evidence had been presented against the defendant; and a permissive attitude toward mistrials in multiple defendant conspiracy cases could lead to an erosion of the double jeopardy provision. 506 F.2d at 297-98.

In contrast, in the case before us, the mistrial was granted

to insure fairness to both the prosecution and the defense; petitioner's medical disability resulted in the mistrial; the prosecutor specifically did not request a mistrial; there is no evidence that the government was not prepared to proceed; and this is not a case of conspiracy or multiple defendants. Consequently, we do not believe **Gori**, **Jorn** or **Glover** compel a grant of habeas corpus relief in this case.

Petitioner's first argument is most forcefully supported by **United States v. Grasso**, 552 F.2d 46 (2d Cir. 1977), **petition for cert. filed**, 46 U.S.L.W. 3089 (U. S. May 6, 1977) (No. 76-1543). There the Second Circuit affirmed the dismissal of an indictment for tax evasion where the mistrial was caused by a government witness recanting his testimony and where the only findings by the trial court were that the issues would be confused if the trial were to continue. The appellate court noted that the central holding of the **Jorn case** probably is the "consideration of other alternatives" test articulated in the plurality opinion. **Id.** at 52 n.2. The **Grasso** court held that double jeopardy barred retrial under either the **Jorn** test or the "sole interest of the defendant" test and stated, in dictum, that a procedural corollary of **Jorn** is that before a trial judge declares a mistrial, he must make explicit findings that there are no reasonable alternatives to mistrial. **Id.** at 52.

However, **Grasso** is distinguishable from the case before us for the following reasons: There, mistrial was provided by the prosecution's witness recanting his testimony rather than by the involuntary physical incapacity of the defendant; the prosecution could have continued on counts unaffected by the recantation or on all counts with a proper instruction to the jury; and most importantly, there was scant evidence that the trial court in **Grasso** explored alternatives to mistrial other than the defendant's motion to dismiss or for acquittal.[5]

In the instant case, the judge was aware of alternatives

5. The circuit court found that any consideration of the reasonable alternative was "at best oblique." 522 F.2d at 53.

to mistrial because they had been advanced by counsel and of the preference of the defendant's attorney for obtaining a verdict with the impanelled jury. His decision was not a hasty one. In addition, neither the prosecution nor a government witness was the cause for the interruption of the trial. Under these circumstances we cannot say, after viewing the evidence most favorably to the petitioner, that the declaration was clearly erroneous or an abuse of the discretion of the trial judge. Determining whether or not to grant a continuance or to proceed without the defendant present is an area particularly within the competence of the trial judge. Thus, we will not fault the declaration of mistrial where the trial court considers all the circumstances and reasonably concludes that there is a manifest necessity for or the ends of public justice require such a declaration. **United States v. Perez**, 22 U. S. (9 Wheat.) 579, 580 (1824).[6]

Petitioner's second argument is that he has a statutory right to waive his further appearance at trial pursuant to Vermont Rule of Criminal Procedure 43(b) (1). It is clear from a straightforward reading of the rule set out in the

6. Since we find there was no abuse of discretion, there is no need to consider petitioner's discussion on whether or not a verdict could have been sustained had the trial judge granted a continuance or continued the trial in defendant's absence.

Our holding in this case does not conflict with **Commonwealth v. Bartolomucci**, 362 A.2d 234 (Pa. 1976), as discussed by petitioner and respondent. In that case, the Pennsylvania Supreme Court affirmed the reversal of petitioner's conviction because the judge at the first trial dismissed the jury without directly inquiring whether they were hopelessly deadlocked, thereby creating a doubt as to whether they were so deadlocked. Consequently, the necessity of the mistrial was not manifest and the double jeopardy clause barred retrial. In the instant case there is no doubt that the trial judge knew of the alternatives to mistrial but in his discretion found a declaration of mistrial to be manifestly necessary.

margin[7] that the rule merely allows the continuance of a trial; it does not give a defendant the right to have his trial proceed without him. The Reporter's Notes support this position. Consequently, petitioner has no claim under Rule 43(b) (1).[8] **See United States v. Tortora**, 464 F.2d 1202, 1210 (2d Cir.), **cert. denied**, 409 U. S. 1063 (1972) (trial court should exercise its discretion to proceed without defendant's presence only in extraordinary circumstances).

Third, petitioner argues that he has a constitutional right to waive his sixth amendment right to confront the witnesses against him. He argues that because **Faretta v. California**, 422 U.S. 806 (1975), held that a defendant has a right to waive assistance of counsel while the Sixth Amendment gives a right to assistance of counsel, petitioner has a right to waive confrontation of witnesses as the Sixth Amendment provides the right to confront witnesses. However, petitioner's premise is incorrect. The Court in **Faretta** held that the right to self-representation is "necessarily implied by the structure of the (Sixth) Amendment", **id.** at 819; it did not base its decision on a right correlative to the right to assistance of counsel. In fact, the Court explicitly repudiated the correlative right analysis relied upon by petitioner here. **Id.** at 819-20 n.15. In addition, the Court in **Singer v. United States**, 380 U. S. 24 (1965), cautioned courts against finding such correlative

7. Vt. R. Cr. P. 43:

(b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial was commenced, whether or not he has been informed by the court of his obligation to remain during the trial . . .

8. During the second conference with the trial judge and prosecuting attorney, defense counsel argued that because defendant could come to court, his decision to stay in the hospital made his absence from court voluntary within the meaning of Rule 43(b) (1). While our resolution of petitioner's second argument renders such a determination unnecessary, we note that we are in agreement with the Vermont Supreme Court that his absence was involuntary under that rule.

rights, for (t)he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." **Id.** at 34-35.

Petitioner's argument that upholding the declaration of a mistrial will imprison him in his privileges ignores the cases in which mistrials declared over the defendant's objection or without the defendant's consent have been upheld. **Illinois v. Somerville**, 410 U.S. 458 (1973); **see Gori v. United States**, 367 U.S. 364, 368 (1961) (citing **Dreyer v. Illinois**, 187 U.S. 71 (1902), **Logan v. United States**, 144 U. S. 263 (1892), and **Simmons v. United States**, 142 U. S. 148 (1891)).

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

Dated at Burlington in the District of Vermont, this 13th day of October, 1977.

ALBERT W. COFFRIN,
District Judge

APPENDIX D.

Vermont Supreme Court Opinion,

Docket No. 162-76, filed on June 7, 1977

Supreme Court Docket No. 56-77

February Term, 1977

	Appealed from:
In re Scott David Dunkerley	Chittenden Superior Court
	Filed June 7, 1977

In the above entitled cause the Clerk will enter:

Judgment affirmed.

FOR THE COURT:

Albert W. Barney, Chief Justice
Concurring

Rudolph J. Daley, Associate Justice

Robert W. Larrow, Associate Justice

Franklin S. Billings, Jr., Associate Justice

William C. Hill, Associate Justice

No. 56-77

In re Scott David Dunkerley

Supreme Court
On Appeal From
Chittenden Superior Court
February Term, 1977

Present: Barney, C. J., Daley, Larrow, Billings, and Hill, JJ.

BARNEY, C. J. This is a petition for habeas corpus based on the prohibition against double jeopardy. The issue came about as the result of emergency hospitalization of the defendant on the third day of his trial for the killing of his stepfather, under a prosecution for first-degree murder. The diagnosis relating to the emergency hospitalization was that of a collapsed lung with a prognosis of a seven- to ten-day hospitalization period. The trial court had another doctor examine the defendant and the diagnosis was confirmed by him, and by a third doctor who was to treat the defendant. The court then ordered a mistrial on its own motion. It is the defendant's position that that ruling raises the barrier of double jeopardy and prevents retrial.

The contested issue in the case related to the insanity or diminished capacity of the defendant so that he would be not guilty by reason of insanity or, at least, not guilty of first-degree murder. This was the only defense put forward; the facts of the shooting of the stepfather with a .22 caliber pistol were not disputed.

At the time of the medical emergency, the jury had been empanelled and the trial was under way. Opening statements describing the theories of the prosecution and defense had been made to the jury. The defendant's mother had testified about the shooting and the relationship between her son, the defendant, and her husband, his stepfather. She had also testified about the defendant's childhood and about his personal difficulties. She had testified on both direct and cross-examination.

After the completion of this examination, the court had recessed for the day. It was the following morning that Dunkerley was taken to the hospital.

The decision to declare a mistrial was left to the trial court. The State refused to move for that disposition, and the defendant, through his attorney, opposed stopping the trial. Defendant's counsel proposed that the defendant waive his right to be present at the trial so that the proceedings could continue. It was also proposed that sequestration of the jury be waived and, if necessary, the trial be temporarily recessed. Counsel based the claim of right upon V.R.Cr.P. 43(b), which provides:

> The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,
>
> (1) in noncapital cases, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or
>
> (2) engages in conduct which is such as to justify his being excluded from the courtroom.

The trial court denied the motion on the basis that the defendant's absence from the courtroom was not "voluntary", as contemplated by the rule in question. In the trial of the habeas corpus petition, that court took the same view — that the absence of the defendant was not voluntary, and that retrial after the declaration of mistrial would not involve double jeopardy. The defendant appealed that decision here.

The defendant's concern for the continuation of the trial centers on the testimony of his mother. She was a witness to his psychological dependence upon her, and to the possibility of his losing touch with reality and believing that she wanted her husband dead. She testified to her husband's mistreatment of her and his dislike of the defendant. From a tactical point of view, it was the opinion of defendant's counsel that this testimonial appearance went well, and that there was risk that a second appearance, before a new jury, might not go as well,

and, further, would cause great emotional distress to the defendant's mother, a key witness.

Under former Vermont practice, the declaration of a mistrial would not have automatically raised a bar of double jeopardy, since it irrevocably attached only upon rendition of a judgment of not guilty. **State v. Velander**, 123 Vt. 60, 61, 181 A.2d 60 (1962); **State v. Frotten**, 114 Vt. 410, 416-17, 46 A. 2d 921 (1946). It was discretionary with the trial judge as to whether he would require the trial to go forward, allow retrial, or order a verdict directed in favor of the defendant. That practice did have the advantage of lessening the tactical maneuvering generated by automatic rules of jeopardy that apply in early trial stages. The trial judge had the authority to prevent any improper impositions or an infringement of a defendant's rights. **State v. Deso**, 110 Vt. 1, 10-11, 1 A.2d 710 (1938).

Since **Benton v. Maryland**, 395 U.S. 784 (1969), Vermont law relating to former jeopardy has, through the operation of the Fourteenth Amendment, become the law of the Double Jeopardy Clause of the Fifth Amendment. Cases raising the issue must be reviewed under the standards for that clause as set out by the United States Supreme Court.

Jeopardy attaches, in contrast to previous Vermont practice, with empanelling and swearing in of the jury, or, in a trial by court, when the court begins to receive evidence. **Illinois v. Somerville**, 410 U.S. 458, 471 (1973) (White, J., dissenting). This case had passed that point. It was interrupted short of verdict.

The law of **United States v. Perez**, 9 Wheaton 579, 580 (1824), is still cited as the governing law of mistrial, as recently as **United States v. Martin Linen Supply Co.**, 45 U.S.L.W. 4337, decided April 4, 1977. The guiding principle stated by Mr. Justice Story reads:

> The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested

> Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

Thus, under the Double Jeopardy Clause also, it has been found necessary to make room for the operation of judicial judgment to prevent the application of the doctrine from being unfair or used to defeat the ends of justice. Although the approaches may differ, basic constitutional objectives have a way of ending up with comparable standards for substantively identical objectives.

The **Perez** case, quoted above, stated in 1824 that definition of all the circumstances governing the exercise of judicial discretion in granting a mistrial is impossible. The Supreme Court maintains that position until this very day. Various concerns have been mentioned, but none has been set out as a governing concern that would override the judge's duty to exercise his discretion.

One of the discretionary concerns talked about in recent cases relates to the interest of the defendant in carrying his trial through to verdict before a jury he sees as possibly favorably disposed toward him. See **United States v. Jorn**, 400 U.S. 470, 486 (1971). But, again the cases make this no more

than a circumstance the judge must fully and fairly consider in reaching a decision on the propriety of a mistrial. **Wade v. Hunter**, 336 U.S. 684, 689 (1949). It does not reach the status of a binding or governing requirement, since its unfounded assertion could be used too easily to defeat the ends of public justice. There is no suggestion in this case that it was ignored as a consideration by the trial court.

Along with the double jeopardy issue in this case is the additional constitutional concern relating to the presence of the accused at his trial to confront the witnesses against him. The argument on behalf of the defendant would reduce this issue to the simple volitional choice of the defendant to insist upon or waive this Sixth Amendment right. The trial judge was burdened with the duty of taking a broader look at the issues involved, in arriving at his discretionary ruling.

There is no doubt but what a judge may allow a non-capital trial to proceed in the absence of a defendant given an effective waiver of his Sixth Amendment right to be present. Indeed, a waiver may even be constructed from the actions of the defendant, including his deliberate non-attendance at the trial. This is what V.R.Cr.P. 43(b) is all about. Its basic design is to convert certain deliberate actions of a defendant into waivers of his right to be present. The purpose is to prevent a defendant, by such deliberate acts, being able to bar the holding of a trial to determine his guilt or innocence. See **Illinois v. Allen**, 397 U.S. 337 (1970).

Both the trial court and the judge hearing the habeas corpus petition held the defendant's absence to be involuntary. Considering the inception of the problem, this is, of course, correct. From this fact, the conclusion followed that V.R.Cr.P. 43(b) did not apply. Although the result reached is correct, it is necessary to comment on the underlying legal principles.

The unstated premise in the defendant's contention involving his Sixth Amendment right to be present and V.R.Cr.P. 43(b) is that he has a constitutional right to have the trial proceed

without him if he waives attendance. It is upon this basis that counsel for the defendant have sought to convert his necessary and inadvertent absence into a voluntary one by subsequent waiver.

Defendant concedes that the defendant's alleged right to have a criminal trial continue in his absence has limitations, such as where his identity is at issue, citing **United States v. Fitzpatrick**, 437 F.2d 19, 27 (2d Cir. 1970). With insanity the governing factual issue in this case, a comparable concern relating to the defendant's presence in court arises in connection with the jury's observation and evaluation of him with respect to his mental condition. See **State v. Pray**, 133 Vt. 253, 257, 336 A.2d 174 (1975).

The proposed waiver of the defendant's right to be present did not compel the trial court to go forward or require that the mistrial constitute double jeopardy. V.R.Cr.P. 43(b) is a rule which does no more than permit certain conduct of a defendant to be construed as a waiver of his constitutional right to be present at the trial, thereby permitting the trial court to exercise its discretion in that light as to whether or not a mistrial should be granted, subject to all the other considerations expressed in United States Supreme Court opinions following **United States v. Perez, supra**, 9 Wheaton 579 (1824).

In **Featherston v. Mitchell**, 418 F.2d 582, 586 (5th Cir. 1969), **cert. denied** 397 U.S. 937, we find the statement, "Protection of Featherston's right not to be so tried, notwithstanding the protestations of his lawyers, made imperative a mistrial of this case." The issue was one of mental competency raised during the fourth week of trial, based on diabetic "blackouts". The mistrial was granted over the objections of the trial counsel. The application of judicial discretion was held necessary and proper.

The Second Circuit, speaking through Judge Lumbard in **United States v. Tortora**, 464 F.2d 1202, 1210 (2d Cir. 1972),

cert. denied 409 U.S. 1063, stated with respect to the continuation of a trial with the defendant absent:

> We do not here lay down a general rule that, in every case in which the defendant is voluntarily absent at the empanelment of the jury and the taking of the evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant.

This is our view of the law, that continuation of a trial with a defendant absent is the extraordinary case, to be undertaken only after the exercise of a careful discretion by the trial judge. The voluntary nature of the defendant's absence only makes the continuation of the trial possible after a review of all the appropriate concerns; it does not compel the trial to go on.

In this case, the record discloses not only the insanity issue, but also a possible prolonged absence by the defendant. Moreover, with the growing body of law that permits a defendant to disaffirm actions such as waiver by attorneys on his behalf, soundly or unsoundly, a realistic evaluation of the comparative interests of the public and the defendant in a trial without the issue of his right to be present is appropriate. It has not been made to appear that the order of mistrial was made in a context that now requires the application of the doctrine of double jeopardy.

Judgment affirmed.

FOR THE COURT:

ALBERT W. BARNEY
Chief Justice

APPENDIX E.

Order by Second Circuit Court of Appeals denying Petition for Rehearing, filed on August 7, 1978

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.

Docket No. 77-2138

SCOTT DAVID DUNKERLEY,
Petitioner-Appellant,

v.

CORNELIUS HOGAN, in his official capacity as Commissioner of Corrections for the State of Vermont and

RICHARD BASHAW, in his official capacity as Superintendent of the St. Albans Correctional Center,

Respondents-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.
Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. WALTER R. MANSFIELD,
Circuit Judges.

Docket No. 77-2138

SCOTT DAVID DUNKERLEY,
Petitioner-Appellant,

v.

CORNELIUS HOGAN, in his official capacity as Commissioner of Corrections for the State of Vermont and

RICHARD BASHAW, in his official capacity as Superintendent of the St. Albans Correctional Center,

Respondents-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX F.

Vermont Rule of Criminal Procedure 43

RULE 43. PRESENCE OF THE DEFENDANT

(a) Presence Required. The defendant shall be present at the arraignment, at any subsequent time at which a plea is offered, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) engages in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for misdemeanors, the defendant may waive appearance under Rule 5 in writing and the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) The defendant's presence is not required at a conference or argument upon a question of law.